

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by First Transit,
Inc. with respect to the procurement of
Transportation and Monitoring Services for
Attendants of the New Berlin Day Habilitation
conducted by the Broome County Developmental
Disabilities State Operations Office

**Determination
of Bid Protests**

SF20130224

July 01, 2013

Contract Number – C360452

This Office has completed its review of the above-referenced procurement conducted by the Broome County Developmental Disabilities Office (“DDSO”), part of the New York State Office for People with Developmental Disabilities (“OPWDD”), and the Appeal filed by First Transit, Inc. (“First Transit”) of the protest decision issued by DDSO with respect thereto. As outlined in further detail below, we have determined that the ground advanced by the Protestor is without sufficient merit to overturn the contract award by DDSO. We, therefore, hereby deny the Appeal and are today approving the DDSO contract with Birnie Bus Services, Inc. (“Birnie Bus”).

BACKGROUND

Facts

On December 20, 2012, DDSO issued a solicitation to ten potential bidders to procure transportation and monitoring services for individuals attending the New Berlin Day Habilitation. The solicitation documents stated that all bids must be received at the Broome County business office by 2:00 pm on January 30, 2013. Only three bidders responded to the solicitation, Birnie Bus, Serafini and First Transit. The bid submitted by First Transit was not received until 2:09 pm, when it was hand delivered to the location by a representative of First Transit. Since First Transit’s bid was not received until after the 2:00 pm deadline, DDSO did not accept the bid and awarded the contract to Birnie Bus as the lowest responsive bidder.

By letter dated January 31, 2013, First Transit protested DDSO’s decision to disqualify its bid due to untimeliness. By letter dated February 4, 2013, DDSO denied the protest and by letter dated February 14, 2013, First Transit appealed DDSO’s protest decision with this Office. In its Appeal, First Transit asserts that its bid was delayed by a national weather emergency and, as such, DDSO’s decision to refuse delivery was arbitrary and capricious.

Procedures and Comptroller's Authority

Under Section 112(2) of the State Finance Law ("SFL"), before any contract made for or by a state agency, which exceeds fifty thousand dollars (\$50,000) in amount, becomes effective it must be approved by the Comptroller.¹

In carrying out the aforementioned responsibilities prescribed by SFL §112, this Office has issued Contract Award Protest Procedures that govern the process to be used when an interested party challenges a contract award by a state agency.² These procedures govern initial protests to this Office of agency contract awards and contract awards made by this Office and appeals of agency protest determinations. Since this is an Appeal of DDSO's protest determination the Appeal is governed by Section 4 of the Contract Award Protest Procedures.

In the determination of this Appeal, this Office considered:

1. The documentation contained in the procurement record forwarded to this Office by DDSO with the DDSO/Birnie Bus contract;
2. The correspondence between this Office and DDSO arising out of our review of the proposed DDSO/Birnie Bus contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
 - a. First Transit's Protest to DDSO, dated January 31, 2013;
 - b. DDSO's Protest Determination, dated February 4, 2013;
 - c. DDSO's Appeal to OSC, dated February 14, 2013.

ANALYSIS OF BID PROTEST

First Transit's Appeal to this Office

In its Appeal, First Transit challenges the procurement conducted by DDSO on the following ground:

1. First Transit's bid submission was delayed due to force majeure and, as such, DDSO's decision to refuse delivery of the bid was arbitrary and capricious.

DDSO's Answer to the Appeal

In its response, DDSO contends the Appeal should be rejected and the award upheld on the following ground:

¹ SFL §112(2).

² Comptroller's G-Bulletin G-232.

1. The bid specifications specifically stated that late bids would not be considered unless it could be shown that the late arrival was due to mishandling by DDSO staff. The specifications further provided that delays in the mail would not excuse late arrival. The late arrival of First Transit's bid was not due to mishandling by DDSO staff and, therefore, was appropriately refused.

DISCUSSION

In the Appeal, First Transit asserts and provides documentation to verify that its bid was scheduled to be delivered by FedEx by 12:00 pm on January 30, 2013, two hours before the 2:00 pm deadline. However, due to severe weather conditions that occurred in the location of the FedEx packing sorting facility, the delivery of First Transit's bid was delayed. First Transit retrieved a scanned version of its bid package and attempted to hand deliver it to the bid opening, arriving at 2:09 pm, nine minutes after the 2:00 pm deadline. DDSO refused the delivery and the bid submitted by First Transit was not considered. First Transit argues that since the delay resulted directly from severe weather conditions and not any fault of First Transit or FedEx, DDSO should have waived the 2:00 pm deadline and accepted First Transit's bid.

DDSO specifically addressed the issue of late bids in the bid specifications that stated:

A late bid will only be considered if: (1) its arrival at the place designated after the time specified can be show by documentary or other proofs to be due to mishandling by BDS [DDSO] Office staff; and, (2) that absent such mishandling, the bid would have arrived timely. Delays in the mail or any other means of transmittal, including couriers or agents of the State, other than employees of the OPWDD or BDS [DDSO] will not suffice to excuse late arrival. A late bid not eligible for consideration may be returned unopened with notification of the reason for its refusal.

Since the reason First Transit's bid was late was not due to mishandling by OPWDD or DDSO staff, First Transit's bid was not accepted by DDSO.

A governmental agency may decline bids which fail to comply with the literal requirements of the specifications. Le Cesse Bros. Contracting, Inc. v. Town Board of the Town of Williamson, 62 AD2d 28, affd. 46 NY2d 960 (1979). Conversely, a government agency has the discretion to waive such non compliance where it is merely an irregularity, such waiver is in the government agency's best interests, and there is no possibility of fraud, corruption or favoritism. In re C.K. Rehner, Inc., 106 AD2d 268 (1st Dep't. 1984).

In Hamlin Construction Co. v. County of Ulster, 301 AD2d 848 (3d Dep't. 2003), even though the Court upheld the government agency's decision to waive the bid specification and accept a bid that was delivered late by FedEx due to the events of September 11, 2001, the Court noted that the government agency was indeed vested with the discretion to reject the bid submitted by the bidder as untimely. Hamlin Construction Co. v. County of Ulster, supra at 849). In Matter of Nole v. Board of Education, 129 AD2d 873 (3d Dep't. 1987), the solicitation issued

by the government agency provided that any bid received after the 2:00 pm deadline would not be accepted. The agency (a school district) opened a bid that was submitted two minutes late, which was the low bid, but declared it informal, and therefore rejected the bid and awarded to the next lowest bidder. The rejected bidder challenged this determination, and the Appellate Division reversed a lower court decision in favor of the rejected bidder and held that:

[a]lthough the power to reject any or all bids may not be exercised arbitrarily or for the purpose of thwarting the public benefit intended to be served by the competitive process . . . the discretionary decision ought not to be disturbed by the courts unless irrational, dishonest or otherwise unlawful . . . the [government agency] herein rejected petitioner's bid for failure to comply with the time requirement provided in the bid advertisement. It cannot be said that the [government agency's] decision to strictly enforce this requirement was irrational, nor does the record reveal anything dishonest or otherwise unlawful in the decision. Matter of Nole v. Board of Education, supra at 874, citations omitted.

While for purposes of this analysis we assume that the late arrival of First Transit's bid was a mere irregularity that could have been waived by DDSO,³ it is clear that DDSO was not required to make such a waiver and its rejection of First Transit's bid was not improper. Based upon the facts of this case, we decline to substitute our judgment for that of DDSO.

CONCLUSION

For the reasons outlined above, we find the issue raised in the Appeal is not of sufficient merit to overturn the award by DDSO to Birnie Bus. As a result, the Appeal is denied and we are today approving the DDSO/Birnie Bus contract.

³ In this protest situation, it is our understanding that the person delivering the copy of First Transit's bid arrived after the opening of the bids. Since the late bid was apparently delivered by an employee of First Transit, it would normally be clear that DDSO could not accept the late bid – since it could not be established that the bid had not been developed based upon the bids previously opened and read. However, in this case, similar to the Hamlin Construction case, the original version of the late bid was in the possession of a third party, FedEx.